

* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

May 3, 2005

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: November 4, 2004

Case No.: TIA-0311

XXXXXXXXXX (the Applicant), through her husband and court-appointed guardian, applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant did not have an illness related to work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA). As explained below, we have concluded that the Appeal should be denied.

I. Background

A. The Relevant Statute and Regulations

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

B. Procedural Background

The Applicant filed a Subpart B application with DOL, claiming beryllium sensitivity and chronic beryllium disease (CBD). The DOL granted the Subpart B application for CBD.

The Applicant filed a Subpart D application with OWA, claiming beryllium sensitivity, CBD, chronic obstructive pulmonary disease (COPD), Parkinson's disease, and a thyroid nodule. The Applicant stated that she worked as a clerk in the C720 building and was exposed to radioactive dust and beryllium dust.

The OWA referred the application to the Physician Panel, which issued a negative determination. Based on the negative results of a beryllium sensitivity test, the Panel determined that the Applicant did not have beryllium sensitivity or CBD. The Panel further determined that the Applicant had COPD, Parkinson's disease, and a thyroid nodule, but the Panel found insufficient evidence to find that the illnesses were related to toxic

exposures at DOE. For each illness, the Panel discussed the Applicant's medical records, industrial hygiene records, and medical literature on the risk factors for the illnesses. The Panel described the industrial hygiene records as follows: "Dosimetry: less than normal background radiation dosing; NIOSH dose reconstruction: unavailable; Site analysis: non-contributory; Area Sampling: unavailable; Industrial hygiene assertions: unavailable."

The OWA accepted the negative determination, and the Applicant filed an appeal. The Applicant reiterates her assertion that she was exposed to radioactive dust and beryllium dust. She states that dust from machine shops located in her building contaminated the other areas of the building.

II. Analysis

We need not consider the Applicant's challenge to the Panel's determination on beryllium sensitivity, CBD, and COPD. The DOL's Subpart B determination that the Applicant has CBD has rendered moot the Panel's determination on the lung illnesses. Authorization Act § 3675(a).

With respect to the remaining illnesses - Parkinson's disease and thyroid nodule, we find no Panel error. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Panel complied with the Rule. The Panel considered the illnesses - Parkinson's disease and a thyroid nodule - found that they were not related to toxic exposures at DOE, and gave a lengthy explanation of the basis of that decision. The Panel cited the Applicant's dosimetry as showing below background radiation and, in any event, does not include the claimed exposures in its list of risk factors. Accordingly, the Applicant's disagreement is, ultimately a disagreement with the Panel's medical judgment, rather than an indication of Panel error. Accordingly, the Appeal should be denied.

In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Advocacy, Case No. TIA-0311, be, and hereby is, denied.

(2) This denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.

(3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 3, 2005